No. 203

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1899

NORTH AMERICAN TRANSPORTATION & TRADING CO.
Plaintiff in Error

vs.

DONALD MORRISON
Defendant in Error

In Error to the Circuit Court of the United States for the District of Washington.

BRIEF OF PLAINTIFF IN ERROR

OF THE MOTION TO DISMISS.

This case comes here direct, under the act of March 3rd, 1891, on error to the Circuit Court on the single question of jurisdiction. The defendant in error has moved to dismiss the writ on the ground that it is frivolous and taken merely for delay. As this motion obviously involves the entire case, we will proceed to consider the certified question.

STATEMENT.

This suit, which is upon a number of steamship tickets, we cannot state more concisely than we have already

done in the certified question itself, and this we will now set forth in full as it was accepted and signed by the trial judge, inserting in it our own references to the pages of the present record.

"I, C.H. Hanford, district judge, presiding in the Circuit Court aforesaid, and the judge before whom the above-entitled cause was tried, do now, on the 29 day of December, 1898, being the December term, at which the judgment and verdict were entered herein, certify as follows:

"Morrison, the plaintiff, alleging himself to be a citizen and resident of the State of Minnesota, began this action in the superior court of King county, State of Washington, against the defendant, alleging it to be a corporation organized and existing under the laws of the State of Illinois and engaged in business in the State of Washington (p. 2). The suit was upon eight causes of action, the first on plaintiff's own account, the other on account of seven alleged assignors of plaintiff. The citizenship of these assignors was nowhere alleged.

"Defendant removed the case to this court on the ground of diversity of citizenship between it and plaintiff Morrison and the involving of a sum exceeding two thousand dollars, exclusive of interest and costs. After removal defendant demurred to each cause of action in the complaint as not sufficient to constitute a cause of action, and as to the last seven causes of action on the additional ground that the court had no jurisdiction to hear it, and this was overruled, with exception to defendant (pp. 37-8). Issue was then joined, and, after two trials, judgment was entered as now complained of in error in the sum of $2,119.50. After the verdict and before judgment defendant moved to dismiss or remand the whole cause and each cause of action on the ground that as to

the first cause of action it did not involve two thousand dollars, exclusive of interest and costs, and as to the second and each subsequent cause of action—that is to say, as to the assigned causes of action—that each of these did not involve two thousand dollars, exclusive of interest and costs, and because, also, it did not appear that proper diversity of citizenship existed at the time of the commencement of the action or at the time of its removal between the assignors of plaintiff and defendant so as to confer jurisdiction upon the Federal Court; which said motion to dismiss and remand was denied, with exception to defendant (pp. 40-41).

"The original complaint shows that the aggregate sum sued for by Morrison was $18,173.20, divided, as already stated, in eight causes of action. The suit was upon eight contracts of carriage between defendant as a carrier and plaintiff and his seven assignors from Seattle to Dawson City, by way of St. Michaels and the Yukon River, which contracts were alleged to have been broken by the carrier by failure and refusal to transport the passengers farther than Fort Yukon on the river.

"The first cause of action—that of plaintiff himself—alleged himself to be a citizen and resident of Minnesota and defendant a corporation organized and existing under the laws of the State of Illinois. The contract was alleged to have been made at Seattle on the 30th day of July, 1897,* and the agreed date of the delivery of the plaintiff at Dawson by the carrier was alleged to be September 15th, 1897 (pp. 3, VI), and this suit was brought on the 17th day of November, 1897 (p. 34). On the breach of the contract at Fort Yukon plaintiff alleged himself compelled to return to Seattle. The damages claimed by him were as follows: (a) The price of his

* A slight error. It was on the 3rd of August (p. 2).

ticket to Dawson City, $200.00; (b) $72.50, returning to Seattle after the breach of contract at Fort Yukon; (c) expense of one dollar a day and loss of time at three dollars a day at Seattle since his return there, the 18th day of October, 1897; (d) three dollars a day from the 30th day of July, 1897, which he could have earned if he had not started on the journey at all; (e) fifteen dollars a day which he could have earned for a year at Dawson after the 15th day of September, 1897; (f) lost baggage, $29.50; the total prayer of this cause of action being $2,301.75.

"The second and subsequent causes of action, being the assigned causes, arose on exactly similar contracts of carriage. The citizenship of the respective assignors was not averred. The damages claimed were exactly the same as those claimed by plaintiff himself, excepting that none of the assignors claimed the item of lost baggage, and that the item of cost in returning from Fort Yukon to Seattle was as low as $61.50 in some instances and as high as $103.25 in others. The lowest sum claimed by any of the assignors as his total damage was $2,261.25, and the highest claimed was $2,303.25.

"Neither in the original nor the assigned causes of action was it alleged that any of these passengers had ever lived in Dawson before, had any previous engagement or business there or any promise of employment, the allegation in each cause of action as to the passenger's damage in this respect being that "he could have found employment and engaged in business by him competent to perform and transact at or about said Dawson City, and thereby secured wages and profits at the rate of fifteen dollars per day continuously from said September 15th, 1897, for the period of the year thence next ensuing," and that "he has wholly lost all of said employ-

ment and time and all of said wages and profits, to his damage in the sum of $2,000.00." It was not alleged what, if any, occupation either plaintiff or any of his assignors had before departure on the journey, nor was it alleged what occupation was expected at the point of destination, or that any expected occupation was communicated to the defendant.

"Now, therefore, I do certify to the Supreme Court the following question of jurisdiction as follows:

"Whether the motion to dismiss and to remand should have been granted because at the time of removal to this court the cause was one of which this court could not take jurisdiction—that is to say whether—

(a) In each of the causes of action the sum or value of the matter actually in dispute, as shown in the pleadings, was less than two thousand dollars, exclusive of interest and costs, and a controversy was involved substantially within the jurisdiction of this court; and whether—

(b) If the foregoing be answered in the affirmative, the amounts claimed in the assigned causes of action could be united to that in the first to make up the jurisdictional amount the citizenship of the assignors not being alleged; and whether—

(c) Supposing the jurisdictional amount was sufficient in each cause of action, the case was even then removable to this court when the necessary diversity of citizenship was alleged only in the first cause of action and was not alleged in those assigned.

C. H. HANFORD, *Judge.*"

There will be noticed (p. 2, IV) a claim also of a contract between the carrier and the passenger for a sale of merchandise to the latter on his arrival at Dawson, but on this score no damages are claimed and the damages are specifically ap-

propriated to the other items, lost time, travelling expenses, and lost baggage, (p. 4).

SPECIFICATION OF ERRORS.

The lower court erred as follows:

First. In denying the motion of defendant to dismiss each of the causes of action in the complaint, because the same and each of them did not, as to the value of the matter in dispute, involve a controversy substantially within the jurisdiction of the United States circuit court.

Second. In denying the defendant's motion to dismiss each of the seven assigned causes of action, because each of said assigned causes of action did not, as to the value of the matter in dispute, involve a controversy substantially within the jurisdiction of the United States circuit court, and because the citizenship of the assignors of plaintiff was nowhere alleged and the circuit court of the United States could not take jurisdiction of assigned causes of action without such allegations.

Third. In refusing to dismiss the whole cause, because it did not as a whole involve as to the value of the matter in dispute a controversy substantially within the jurisdiction of the United States circuit court and because their being united with the first cause the seven assigned causes of action in which the proper diversity of citizenship did not appear, the whole of the cause was beyond the jurisdiction of the United States circuit court.

Fourth. In denying the defendant's motion to remand this cause to the State court for the reason that at the time of the removal thereof it was not, either as to the value of the matter in dispute or as to the citizenship of the parties, within the jurisdiction of the United States circuit court.

Wherefore the said North American Transportation and Trading Company prays that the judgment of the circuit court of the United States for the district of Washington be reversed.

BAUSMAN, KELLEHER & EMORY,
Attorneys for Plaintiff in Error.

Indorsed: Assignment of errors. Filed Dec. 29, 1898, in the U. S. circuit court. A. Reeves Ayers, clerk, by H. M. Walthew, deputy.

ARGUMENT.

The assignment of errors may be more conveniently discussed under the three heads of the certified question:

I.

"*Whether in each of the causes of action the sum or value of the matter actually in dispute as shown in the pleadings, was less than two thousand dollars, exclusive of interest and costs, and a controversy was involved substantially within the jurisdiction of this court.*"

If the celebrated rule in *Hadley vs. Baxendale* is still the law, we do not see how the passenger here can recover for lost time at Dawson, and, if he cannot recover for that, he has no remaining items of damage sufficient to make up the jurisdictional sum. To this objection each of the eight causes of action is open. Of the six grounds of damage alleged (p. 4), we find that $2000 is appropriated, as stated in the certificate, to the lost wages at Dawson by non-arrival there. If, therefore, what he could have earned at Dawson is too remote and speculative to be recovered, there remains in each cause of action less than the jurisdictional amount. The other items of damage are insufficient. Whether such a claim as lost time and wages at Seattle, the point of departure, can be recovered under any circumstances, need not be considered,

for even if it be computed at its full rate from the date of departure, Aug. 3rd, 1897, to the date of suit, Nov. 17th, 1897, it is not enough either by itself or with the others. The jurisdictional amount, accordingly depends in each of these causes of action on the lost time at Dawson.

This inquiry is indispensible, too, for our jurisdictional objections are against the first cause of action as well as the others, and the first, plaintiff's own, is objected to only as to amount It is the others that are objected to both as to amount and as to assignment. We must, to dispose of the first, take up now the broad question whether, even if a passenger can recover for lost time at all, he can do so under allegations like these, which plainly indicate him to have been merely in search of new fortunes.

In this case no engagement at the point of destination is alleged, no employment there beforehand at all, as in the case of a man returning to his regular place of business and delayed by the carrier, but at most a condition of things that it would be possible for him, if he desired, to get work there, with full liberty, though, to change his mind either as to the kind of work or as to working at all. Now, nothing can be plainer than that, if a passenger may recover for loss of time at a destination where he has no previous engagement, he has an enormous advantage over his carrier in any suit for delay. He can change what was his original intention and not be discovered. Originally intending, perhaps, not to take any certain employment in the place of destination but simply to become a speculator or man of leisure, he may, once he is delayed, become extravagant in his protestations of loss, declare himself outraged, elect to consider himself as having lost some employment at the point of destination, and mulct the carrier, when, in point of fact, he has not been damaged

at all. Where, on the other hand, the passenger has a definite employment at the point of destination, as in the case of one's returning to one's business; or of one's going to fill a contract of employment already arranged, there the thing is more clear and certain.

Morrison's case is simply that of a man who has left home to seek new fields, an adventurer to the gold fields in the historic excitement of 1897. What in the world he would do there probably he himself did not know. At a place like Dawson he might become a gambler, run a restaurant, speculate in mines, keep a lodging house, become a workman in town or a miner in the country. On the day of his arrival he might deem it best to avoid going into any employment, in the hopes of making some profitable speculation. That men act in this way everybody knows. Too often it is only when delayed by a carrier, that they find it profitable to allege some specific employment, the loss of which was a great calamity to them. When delayed by the carrier, they become persons wanting employment as miners where miners' wages are high.

Why say, even if there be a good demand for labor, that this particular man is the sort of person whom employers favor, or that he is the kind of man to get quickly or to keep long any employment that he does obtain? Is he goodnatured or quick tempered, slow or active, drunken or sober, vigorous or weakly? These questions make the whole thing speculative.

Such reasonings as the foregoing have influenced the courts into what seems now to be the settled law that when a passenger is delayed in his journey and ultimately completes it, he cannot recover for any loss of time, though he may re-

cover what are often his heavy expenses in finishing the journey.

1 Fetter, Carriers, section 124.

The cases are well collected in the foregoing; but there are some others. The English case of *Hamlin vs. Great Northern Railway*, cited by Fetter, is followed in

La Blanche vs. London & N. W., L. R., 1 C. P. D. 286, 48 L. J. C. P. 521, 34 L. T. 677, 24 W. R. 808.

The measure of damages adopted in the English and American cases, as cited above, and also referred to by Fetter, seems to be fully borne out by the doctrine announced by this court in a telegraph case:

West Union Tel. Co. vs. Hall, 124 U. S. 444.

and the rule in *Hadley vs. Baxendale*, (itself a suit against a carrier for delay), is adopted in this court in

Howard vs. Stillwell & Bierce Mfg. Co., 139 U. S. 199.

Where the journey is entirely broken up and the travellers return to the point of departure, as here, lost time may possibly be recovered as of the point of departure. Fetter, in laying down the rule forbidding loss of time in journeys completed after delay, seems to allow this exception. If this should be the law, plaintiff's case is hopelessly below the jurisdictional sum, for, conceding that such time could be recovered for, there is not enough of it here to make up the jurisdictional amount. The allegations (p. 4, XII) state such loss from August 3rd, 1897, to the commencement of the action, Nov. 17th, 1897 (p. 34), at three dollars a day. The Supreme Court of the State of Washington apparently adopts this measure of damages in a case arising out of the very case in-

volved here. *Smith vs. North American, etc. Co.*, 20 Wash., 580.

Hadley vs. Baxendale, already referred to, would seem to have stated a much better case against the carrier than this. The complaining party had an established business, the carrier knew it, and the shipment was wanted for a specific purpose of which the carrier was informed.

The rule we are contending for does not entirely abolish recovery for lost time in cases of carrier and passenger. To that extent it is not necessary to go. Such passengers as are returning to their regular business or who have an engagement at their destination may still recover.

II.

"*Whether if the foregoing be answered in the affirmative, the amounts claimed in the assigned causes of action could be united to that in the first to make up the jurisdictional amounts, the citizenship of the assignors not being alleged.*"

We see no objection to joining fractional sums in different causes of action to make up the aggregate amount for jurisdiction, provided each of the component causes of action is itself otherwise a proper one for a federal circuit court. But if such be not the case, that is to say, if the causes lack the proper citizenship in fact or by presumption, they would be improper even if exceeding each the jurisdictional sum. This point need not be further considered, for, if we are right in the next, this will *a fortiori* be held in the negative.

III.

"*Whether, supposing the jurisdictional amount was sufficient in each cause of action, the case was even then removable to this court, when the necessary diversity of citizenship was alleged only in the first cause of action, and was not alleged in those assigned.*

Since the decision in *Mexican Nat'l Ry. vs. Davidson*, 157 U. S. 201, the jurisdictional objection on assigned claims applies under the existing statutes to removed causes, like the present, as well as to original. If, then, this was a case solely of assigned causes of action, it is not to be doubted that the removal was improper because the citizenship and residence of the assignors nowhere appeared, either in the complaint or in the petition for removal. Their citizenship must affirmatively appear. (*Parker vs. Ormsby*, 141 U. S. 81.)

The jurisdiction retained by the lower court, accordingly, can be defended only on the reasoning that, as plaintiff had one cause of action of his own in which the citizenship was sufficient, he could add other causes, though his by assignment, without regard to the citizenship of his assignors. But surely this is not the law. If it be the law, then the statutory inhibition is easily evaded. For such an exception as this we can see no reason. A plaintiff who is chosen to receive assigned claims for suit in a federal court is always selected with proper citizenship of his own and yet cannot maintain the suit if his assignor had not the requisite citizenship too. Now, why should he be able to prosecute the forbidden claim, simply because he has tacked on one of his own? The lower court appeared to think (p. 38) that, as the local law gave plaintiff a right to join as many causes of action in contract as he chose, this right should not be taken away from him. Very well. On the lower court's own reasoning plaintiff's rights would have been retained for him by remanding the whole case on our motion to the state court, where there could be no objection at all to such a joinder. Perhaps the lower court reasoned that to remand the *whole* case, all the causes of action, was more than he could properly do, as one cause of action did have the requisite citizenship. But the

causes of action do not become melted together. Each must stand on its own jurisdictional condition. See the separate treatment of two causes of action in *Ry. Co. vs. Davidson supra.*

But there seems to us no difficulty in retaining the first cause of action and dismissing or remanding the others, or, if the first cause was not properly removed as a separable controversy, then to dismiss or remand the whole. The federal rule as to assigned claims is not to be violated because in the state court the plaintiff would have had greater rights. This may be a good reason for remanding the cause, but not a justification for retaining it.

Only one thing remains to be discussed under this head. It may possibly be suggested that the claims assigned here are not of the sort forbidden by the assignment clause of the federal act. For our own part, though, we have very little doubt that, as these are assigned, suits upon tickets (p—), they are clearly within the inhibition. *Mississippi Mills vs. Cohn*, 150 U. S. 202, *Plant Inv. Co. vs. Ry*, 152, U. S. 71, *Mexican Nat'l. Ry. vs. Davidson*, 157 U. S. 201, and at Circuit see, *Simons vs. Ypsilanti Paper Co.*, 33 Fed. 193, *Wilkinson vs. Wilkinson*, 2 Curtis 582, *Chase vs. Sheldon Mills*, 56 Fed. 625.

Respectfully submitted,

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